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IN THE SUPREME COURT OF THE UNITED STATES

No. 752

CHARLES MILLER, R. J. SWEARINGEN, ELMER E. ANDERSON AND HOWARD BARKER, *Appellants*

vs.

KANSAS-BOSTWICK IRRIGATION DISTRICT NO. 2, F. H. GARMAN, WARD DOUGLAS, ALBERT BILLINGS, and FRED SWOYER, for himself and other landowners similarly situated as Interveners, Appellees

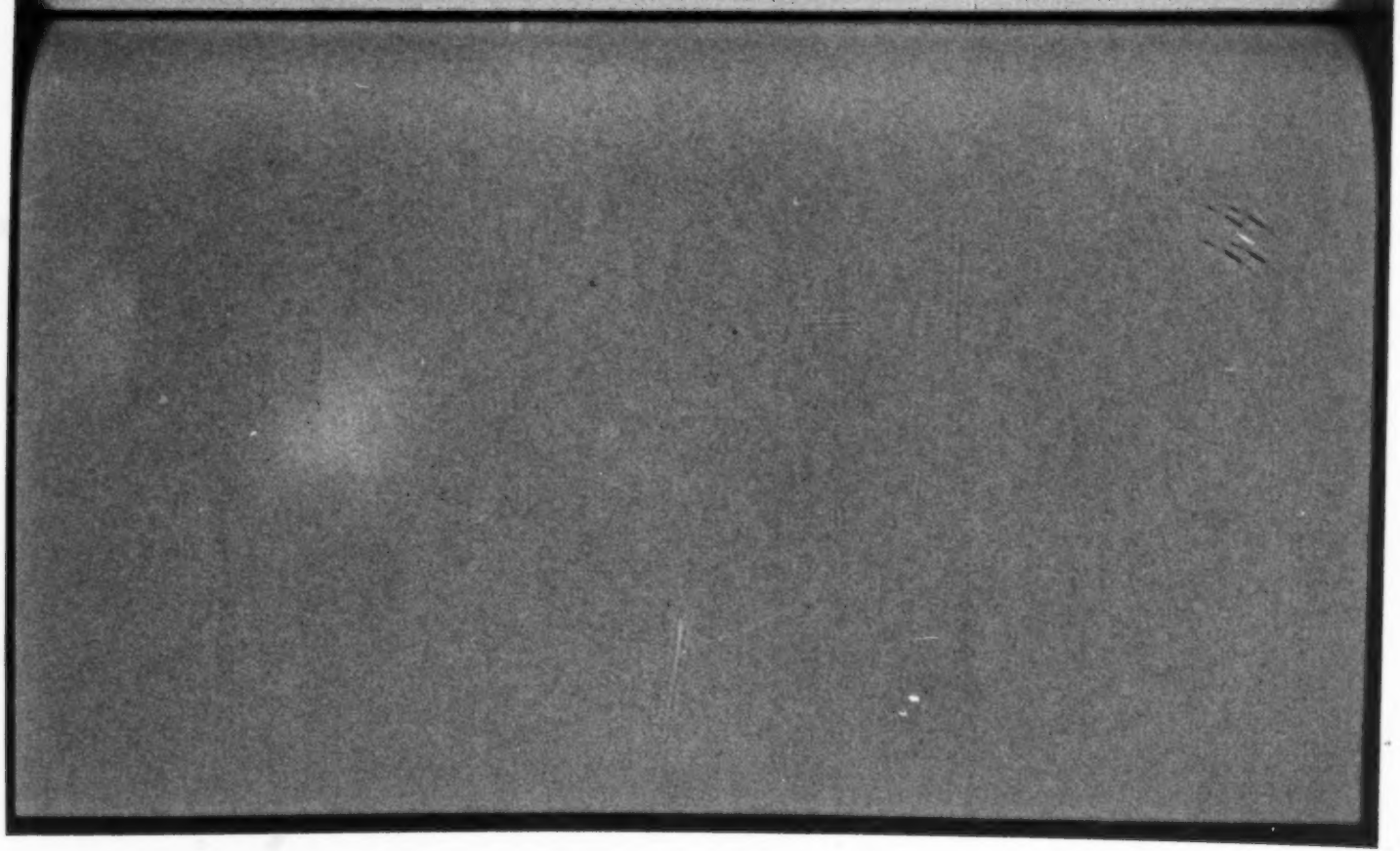
Appeal from the Supreme Court of the State of Kansas

BRIEF OF APPELLANTS OPPOSING APPELLEES' MOTION TO DISMISS

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INDEX

Cases Cited

	Page
Atlantic Coast Line R. Co. v. Phillips Ga. 1947, 67 S. Ct. 1584, 332 U. S. 168, 91 L. Ed. 1977, 173 A.L.R. 1	2
Chicago, B. & O. R. Co. v. Nebraska, ex rel. Omaha, 170 U. S. 57, 18 S. Ct. 513, 42 L. Ed. 948	2
Duran v. Middle Rio Grande Conservancy District, 46 N. M. 138, 123 P. 2d 389	6
Hunter v. Pittsburgh, 207 U. S. 161, 52 L. Ed. 151, 28 S. Ct. 80	6
Merchants National Bank v. Escondido Irrigation District, 144 Cal. 329, 77 P. 937, 100 A.L.R. 174	6
Millsaps College v. City of Jackson, Miss. 1927, 48 S. Ct. 94, 275 U. S. 129, 72 L. Ed. 196	2
Nampa v. Nampa & M. Irrig. Dist. 1911, 19 Idaho 779, 115 Pc. 979	7
Trustees of Dartmouth College v. Woodward, 4 Wheat 518, 4 L. Ed. 629	2

Texts

12 Am. Jur. Constitutional Law Sec. 417	6

Statutes

Kansas General Statutes 1949, 42-701	3
Kansas General Statutes 1949, 42-721	3, 4
Kansas General Statutes 1949, 60-1121	5
Kansas General Statutes 1949, 60-3127	5

IN THE SUPREME COURT OF THE UNITED STATES

No. _____

CHARLES MIZER, R. J. SWEARINGEN, ELMER E. ANDERSON AND HOWARD BARBER, *Appellants*

VS.

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In connection with their Motion to Dismiss the appellees have filed a statement against the claim of jurisdiction of the Supreme Court to review this appeal. The sole basis for the motion to dismiss is that there is a lack of substantiality in the claimed federal question that the state statute assailed as unconstitutional impairs a contract of the appellants. In support of their motion the appellees argue that no contract right of appellees has been impaired and therefore Article 1, section 10 of the Constitution has not been

violated. This argument is directed not at the jurisdiction of the court to hear the appeal but rather involves the merits of the case itself.

The appellants in their Statement of Basis of Jurisdiction have not considered it proper to go into the various questions which will be fully covered in the brief of appellants which will be prepared after the record is printed. The only cases cited by appellants are those cases which sustain the jurisdiction of the Supreme Court of the United States to review the judgment of the Supreme Court of the State of Kansas. The rule seems to be well settled that a claim of a private citizen that a state statute impairs a contract obligation is an appeal to the United States Constitution and cannot be foreclosed by a state court's determination whether there was a contract or what were its obligations. *Atlantic Coast Line R. Co. v. Phillips, Ga.* 1947, 67 S. Ct. 1584, 332 U. S. 168, 91 L. Ed. 1977, 173 A.L.R. 1. In *Millsaps College v. City of Jackson, Miss.* 1927, 48 S. Ct. 94, 275 U. S. 129, 72 L. Ed. 196, the Supreme Court held that a decision of a state court upholding a state tax on college property which was challenged in the court below as impairing the charter rights to exemption in violation of the Federal Constitution, is subject to review by the United State Supreme Court. In *Chicago, B. & Q. R. Co. v. Nebraska, ex rel. Omaha,* 170 U. S. 57, 18 S. Ct. 513, 42 L. Ed. 948, the Supreme Court held that a federal question is raised by an unsuccessful contention in a state court that the obligations of a contract have been impaired by state statute and ordinances. The same rule is recognized in *Trustees of Dartmouth College v. Woodward,* 4 Wheat 518, 4 L. Ed. 629. The above cases are not cited for the purpose of argument of appellants' case on the merits; they are cited because they are examples of a multitude of decisions which sustain the jurisdiction of the Supreme Court of the United States to review a

judgment of a state supreme court where it has been contended that obligations of a contract have been impaired by a state statute.

In the instant case the facts are substantially as follows: Some time prior to July of 1948 some of the landowners of Republic and Jewell Counties in Kansas became interested in the possibility of irrigation for their lands by utilization of the waters stored at the Harlan dam across the Republic River, about 80 miles to the west in Nebraska. At that time there existed a sharply divided difference of opinion among the landowners as to the desirability and feasibility of irrigation in that area. This difference of opinion has continued down to the present time. In any event sufficient interest was manifested in irrigation prior to July 1948 to cause the circulation of a petition for the organization of an irrigation district for the area. Under Kansas General Statutes of 1949, 42-701 and following, the organization of an irrigation district was accomplished by petition of a majority of the qualified owners of irrigable lands within a proposed district to the chief engineer of the Kansas state division of water resources. After his approval was obtained a charter was issued by the Kansas secretary of state. Prior to 1951 the law (Kansas G.S. 1949, 42-721) provided that no assessments should be made against the lands of any person in the district without the proposal or contract being first submitted to the electors of the district and approved by a majority of the electors of the district. This law was in effect when the Kansas-Bostwick Irrigation District No. 2 was organized, and the appellants and other landowners who were somewhat skeptical of the irrigation project, signed the petition for its organization under the inducement and with the definite understanding that before their lands could be subjected to assessments for irrigation development, they would have the right to vote on the proposal or contract. In

other words they were advised by the circulators of the petition for organization of the irrigation district that they were protected by the statute in the event they should disapprove of any proposed contract for irrigation because they should have the right to vote before their lands could be subjected to assessments.

With that understanding in mind the appellants and many other landowners signed the petition for organization of the district. The petition was filed with the chief engineer of the Division of Water Resources of the Kansas State Board of Agriculture on July 18, 1948; a hearing was had on the petition on September 21, 1948, and the chief engineer granted the petition. No appeal was taken and transcript of the proceedings was filed with the Secretary of State on October 26, 1948. Articles of incorporation were issued and recorded, and thereafter the district elected its officers.

The appellees, F. H. Garman, Ward Douglas and Albert Billings, are the officers of the district. On or about April 20, 1951, a contract was entered into between the Kansas-Bostwick Irrigation District No. 2 and the United States providing for irrigation within the district.

At this point in the history of the case at bar all is calm; there is no controversy. Under Kansas G. S. 1949, 42-721, the contract entered into between the irrigation district and the United States must be first submitted to the electors of the district and approved by a majority of the electors of the district before any assessment could be made against the lands of any person in the district. Under the statute electors must be landowners and residents of the state of Kansas. But no election was called by the board for the approval of the contract by the electors of the district.

Instead the statute which is assailed in the instant case was passed by the Kansas 1951 legislature which statute abolishes the right of the landowners in the district to vote on pro-

posals or contracts entered into by the officers of irrigation districts and in its place sets up a procedure whereby the board of directors of the district file an action in the state district court for the approval of the contract and the equality of the assessments by the district court. The landowners in the district no longer have the right to vote on proposed contracts which may result in assessments against their lands.

The appellees, Kansas-Bostwick Irrigation District No. 2 and it board of directors then proceeded to file an action in the District Court of Republic County, Kansas, to have that court approve the contract and the schedule of assessments.

After that action was filed for approval of the contract, the appellants on behalf of themselves and over 200 other landowners similarly situated filed the case at bar in the District Court of Republic County, Kansas, pursuant to the Kansas Declaratory Judgment Act, Kansas G. S. 1949, 60-1121 and G. S. 1949, 60-3127, seeking an injunction to enjoin the irrigation district and its officers from proceeding further with the approval action and from carrying out the provisions of the proposed contract and from levying any assessments against the lands of the plaintiffs until the plaintiffs and the other landowners have the opportunity to vote on the proposed contract and further seeking a declaratory judgment decreeing that the 1951 statute is unconstitutional and in violation of the constitutional rights of the plaintiffs.

From the initial pleading the validity of the statute in question has been brought before the court and throughout the litigation at every stage of the proceedings the appellants here have contended that the statute violates their constitutional rights as impairing the obligation of a contract in violation of Article 1, Section 10, of the United States Constitution. Another issue involving the Constitution of the State of Kansas was pursued by appellants below which, of course, does not present a federal question and is not involved on this

appeal. But there is a valid federal question before the Supreme Court of the United States at this time; that question involves the obligation of contracts clause of Article 1, Section 10, of the Constitution. Questions as to the existence of a contract or as to whether or not a contract, if it exists, has been violated involve the merits of the case.

The appellees argue that the Kansas-Bostwick Irrigation District is a municipal corporation with only those powers that are given by the legislature and which powers may be increased, modified, or taken away by the legislature without the consent of any of the landowners or others interested in the district. The appellees fail to distinguish between purely governmental subdivisions created by legislative fiat to promote and carry out strictly governmental functions, and those types of corporations which are created by the voluntary action of certain individuals to carry out functions which are primarily for the benefit of those particular individuals and are only incidentally for a public purpose. An irrigation district is not a public municipal corporation; it is a quasi-public corporation engaged in activities of a private rather than of a governmental nature. The rule is well settled that even in the case of strictly municipal corporations, in determining whether a statute affecting such municipal corporation operates as an impairment of the obligation of a contract, regard must be had to the distinction between the rights of such a corporation in its public or governmental capacity and its private rights. See *Hunter v. Pittsburgh*, 207 U.S. 161, 52 L. Ed. 151, 28 S. Ct. 80; 12 Am. Jur. Constitutional Law Sec. 417; *Merchants National Bank v. Escondido Irrigation District*, 144 Cal. 329, 77 P. 937, 100 A.L.R. 174; *Duran v. Middle Rio Grande Conservancy District*, 46 N. M. 138, 123 P. 2d 389. It is true that neither the charter of a municipal corporation nor any legislative act regulating the use of property held by it for *governmental* or *public purposes* is a con-

tract within the meaning of the Federal Constitution. Yet municipalities have and exercise powers that are not strictly governmental in character. They may lawfully make contracts under which rights are acquired or liabilities incurred, and the legislature cannot legally pass any statute impairing rights thus acquired either by a municipal corporation or by persons dealing with it.

After an irrigation district is organized in Kansas the policies of the district are under the control of the landowners themselves since only the landowners are qualified to serve on the board of directors and only landowners have the right to take part in elections to select the board or for the approval of the issuance of bonds. It is true that irrigation districts are organized as quasi public corporations, but their function is to conduct a business for the private benefit of the landowners. They do not carry out governmental functions. See for example *Nampa v. Nampa & M. Irrig. Dist.* 1911, 19 Idaho 779, 115 Pac. 979, where the court declares:

> "An irrigation district is a public quasi corporation organized, however, to conduct a business for the private benefit of the owners of land within its limits. They are the members of the corporation, control its affairs, and alone are benefited by its operations. It is, in the administration of its business, the owner of its system in a proprietary rather than a public capacity, and must assume and bear the burdens of proprietary ownership."

It must be kept in mind that irrigation districts are not mere creatures of the state in the sense that they are created as governmental subdivisions to carry out governmental functions. Under the statutes of Kansas irrigation districts are created by the voluntary action of the landowners themselves. Kansas landowners are not compelled by the State of Kansas to adopt an irrigation program whether or not they desire to do so. The Kansas legislature simply makes it possible for

them to organize an irrigation district upon certain terms and conditions which are set forth in our statutes. The landowners can examine those statutes and determine whether or not those terms and conditions are acceptable. If a majority of the landowners desire to accept the terms and conditions offered by the legislature, they may contract among themselves to organize an irrigation district. The statute is one "ad invitum." The landowners have the option as to whether or not they desire to create a district. It is this situation which gives rise to a contractual relationship between the landowners the obligation of which must be protected from subsequent legislative enactments. The right to control the contracting powers of the board of directors of the irrigation district is, of course, a valuable property right. The right to vote on proposed contracts which may result in assessments against the lands in the district was the inducement which led the appellants and the other landowners in the district to enter into the organization of the district. It is this fundamental right which the appellees refuse to recognize. It is this quality which takes irrigation districts in Kansas out of the category of school districts, road districts and other purely governmental subdivisons. It should be noted that the trial court accepted the position of appellants and held the state statute in question unconstitutional as impairing the obligation of contract in violation of article 1, Section 10, of the Constitution of the United States.

This brief is not meant to be a comprehensive discussion of the questions involved on the merits of this appeal. It has been prepared for the sole purpose of showing to the court that the court has jurisdiction of this appeal and that substantial questions are involved.

We submit that the Motion of Appellees to Dismiss should be overruled.

Respectfully submitted,
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